

DRAFT

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: October 28, 2004

Resolution No. L- 312

RESOLUTION

RESOLUTION L-312 Approves confidentiality provisions for Exempt Wholesale Generators who provide information to the Commission pursuant to Commission authority that is independent of implementation and enforcement duties related to Public Utilities Code 761.3.

SUMMARY

Resolution L-293, adopted on February 8, 2001, memorialized the Commission's broad responsibility and authority regarding the safety and reliability of electric service and its importance to the safety, health, and welfare of this state's citizenry and economy. In that resolution the Commission ordered exempt wholesale generators to provide all requested materials to the Commission and provided notice that the Commission would, "effectuate this Order through inspections, interviews, data requests, examinations, audits, investigations, depositions, subpoenas and other necessary means available to it under relevant laws, including but not limited to, the Federal Power Act (FPA), the California Constitution, the California Government Code, the California Evidence Code and the California Public Utilities Code."

Resolution L-293 also provides for the confidential treatment of materials provided to the Commission under statutory provisions set out therein or under the Protective Order in a Commission proceeding entitled "Order Instituting Investigation Into the Functioning of the Wholesale Electric Market and Associated Impact on Retail Rates." (I.00-08-002.)

DISCUSSION

The Commission, as stated in Resolution L-293 and elsewhere, has broad and continuing responsibility and jurisdiction regarding the health, safety and reliability of the state's electrical generation facilities. The Commission also has specific jurisdiction to

implement and enforce Public Utilities Code section 761.3. In implementing section 761.3 we adopted General Order (GO) 167. Section 15.4 et.seq. of GO 167 provides for the confidential treatment of materials provided to the Commission pursuant to that GO. That GO was adopted on May 6, 2004 after extensive opportunity for public comment. We intend to adopt herein the confidentiality provisions of GO 167 to apply to all materials provided to the Commission by electric wholesale generators.

The applicable confidentiality provisions are as follows:

- 15.4 Confidentiality. All claims of confidentiality related to the implementation and enforcement of this General Order must be based on the provisions of this subsection.
 - 15.4.1 Burden of Establishing Privilege. A Generating Asset Owner must accompany any requests for confidential treatment of information with a reference to the specific law prohibiting disclosure, the specific statutory privilege that it believes it holds and could assert against disclosure, or the specific privilege it believes the Commission may and should assert against disclosure. The Generating Asset Owner bears the burden of proving why any particular document, or portion of a document, must or should be withheld from public disclosure.
 - 15.4.2 Confidentiality Claims Requiring Balancing of Interests. If a confidentiality request is based on a privilege or exemption requiring a balancing of interests for and against disclosure, rather than on a statutory prohibition against disclosure or a privilege held by the Generating Asset Owner, the Generating Asset Owner must demonstrate why the public interest in an open process is clearly outweighed by the need to keep the material confidential. A Generating Asset Owner which is a public utility should not cite Public Utilities Code § 583 as a sole basis for the Commission's nondisclosure of information since, as noted in D.91-12-019, § 583 does not create for a utility any privilege that may be asserted against the Commission's disclosure of information or designate any specific types of documents as confidential.
 - 15.4.3 Requirements. A Generating Asset Owner desiring confidential treatment of information provided to the Commission shall at a minimum:
 - 15.4.3.1 Specifically indicate the information that the Generating Asset Owner wishes to be kept confidential, clearly marking each page, or portion of a page, for which confidential treatment is requested.
 - 15.4.3.2 Identify the length of time the Generating Asset Owner believes the information should be kept confidential and provide a detailed justification for the proposed length of time. The business sensitivity of information generally declines over time and the

balancing of interests for and against disclosure may change accordingly.

- 15.4.3.3 Identify any specific provision of state or federal law the Generating Asset Owner believes prohibits disclosure of the information for which it seeks confidential treatment and explain in detail the applicability of the law to that information.
- 15.4.3.4 Identify any specific privilege the Generating Asset Owner believes it holds and may assert to prevent disclosure of information and explain in detail the applicability of that law to the information for which confidential treatment is requested. For example, if a Generating Asset Owner asserts that information is subject to a trade secret privilege (Evidence Code § 1060 *et seq.*), the Generating Asset Owner must explain (a) how the information fits the definition of a protectible trade secret (*e.g.*, how the information provides its holder with economic value by virtue of its not being generally known to the public and what steps the Generating Asset Owner has taken to maintain the secrecy of the information); and (b) why allowance of the privilege will not tend to conceal fraud or otherwise work injustice.
- 15.4.3.5 Identify any specific privilege the Generating Asset Owner believes the Commission holds and may assert to prevent disclosure of information and explain in detail the applicability of that privilege to the information for which confidential treatment is requested. For example, if the privilege is one that involves a balancing of public interests for and against disclosure, such as the official information privilege in Evidence Code § 1040(b)(2), the Generating Asset Owner must demonstrate that the information at issue falls within the definition of official information and the Commission's disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.
- 15.4.3.6 State whether the Generating Asset Owner would object if the information were disclosed in an aggregated format.
- 15.4.3.7 State whether and how the Generating Asset Owner keeps the information confidential and whether the information has ever been disclosed to a person other than an employee of the Generating Asset Owner.
- 15.4.4 Duration of Confidentiality Claims. A confidentiality claim, whether or not specifically acted upon by the Commission, expires on the earliest of

the following dates: (a) at the end of the period specified by the Generating Asset Owner pursuant to subsection 15.4.3.2; (b) at the end of a period specified in a specific Commission ruling or decision; or (c) two years after the claim was first asserted before the Commission. To reassert the confidentiality claim, the Generating Asset Owner must again satisfy the requirements of this subsection 15.4 before the end of the confidentiality period. Staff may disclose information provided under a claim of confidentiality if the Commission has already authorized disclosure of that class of information.

The Commission closed I.00-08-002 as of August 19, 2004, and no new claims of confidentiality under the Protective Order will be permitted after the date this Resolution is adopted. (Protective Order Concerning Responses to CPUC Subpoenas (Third Modified Version, Adopted August 13, 2004 in I.00-08-002.) We also terminate the confidentiality provisions of Resolution L-293 as of the date this Resolution is adopted.

The confidentiality provisions that would no longer be applicable in L-293 are the italicized portion, as follows:

In the event that confidential information such as trade secrets or sensitive commercial information, is requested by the Commission, the entities subject to this Order, their employees, agents and affiliates are hereby notified that they shall provide such information to the Commission, its employees and agents, and shall mark such information as confidential and provide the reason for the assertion. Entities subject to this order and their employees and agents, shall include with any assertion of confidentiality, the basis for treating the information as confidential, the justification(s) why the information is confidential, the source of the information (including the identity of the person who prepared the information), when the information was prepared, the purpose of the information, whether the information has been previously distributed and the identity of known recipients as well as demonstrating that, where information has previously been disclosed, that its confidentiality has been maintained.

This Commission, its employees, and agents will not publicly disclose trade secrets or sensitive commercial information obtained in response to this order and/or to inspections, interviews, data requests, examinations, audits, investigations, depositions, subpoenas and/or other methods of discovery employed by it. (16 USC, § 824(g); see also, Gov't. Code, §§ 6254, 11183; Evid. Code, § 1040; Pub. Util. Code, § 583; Commission General Order 66-C.). In a Commission proceeding entitled "Order Instituting Investigation Into the Functioning of the Wholesale Electric Market and Associated Impact on Retail Rates" (I.00-08-002), certain EWGs and other

entities have provided information to the Commission pursuant to a protective order last modified on November 2, 2000. For purposes of this Order the entities subject to this Order may provide requested information to the Commission under the provisions of that protective order or pursuant to the statutory provisions set forth immediately above. However, in all cases, the entities subject to this order shall specify as set forth herein, all information that is to be held confidential, the reasons therefore, and whether the entities subject to this Order are relying on statutory protections offered or on the protective order issued in I.00-08-002.

COMMENTS ON DRAFT RESOLUTION

The draft resolution was mailed to the parties in accordance with Pub. Util. Code sec. 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____.

[Insert summary of comments received, if applicable.]

ORDER

We adopt the confidentiality provisions of our General Order 167 as applicable to all materials provided to the Commission by Electric Wholesale Generators. This order is effective notwithstanding any challenge to all or any part of D.04-05-018 or General Order 167.

This Order is effective today.

I certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting of _____. The following Commissioners approved it:

STEVE LARSON
Executive Director

